IN TH

Supreme Court of the United States

No. 78-1541

CHARLOTTE B. HOWELL, *Petitioner,*

v.

MITTEN H. GATES and C.B.H. CABIN, INC., *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF COLORADO

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INDEX

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CHARLOTTE B. HOWELL, *Petitioner,*

v.

MITTEN H. GATES and C.B.H. CABIN, INC., *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF COLORADO

Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the State of Colorado, entered in the above-entitled action on August 10, 1978 (Appendix A). A petition for writ of certiorari from the Supreme Court of the State of Colorado to the Court of Appeals of the State of Colorado was denied on December 12, 1978 (Appendix B).

GROUNDS FOR JURISDICTION

The judgment of the Colorado Court of Appeals was entered on August 10, 1978 (Appendix A). A timely petition for rehearing was submitted and was denied on

September 7, 1978 (Appendix C), and a Petition for Writ of Certiorari to the Colorado Court of Appeals from the Supreme Court of the State of Colorado was timely filed and was denied on December 12, 1978 (Appendix B). This Court then extended the time to file a Petition for Writ of Certiorari to and including April 9, 1979. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the judgment and opinion of the trial court and Colorado Court of Appeals divesting Petitioner of her real estate which had been conveyed to a sham corporate entity in an effort to avoid estate and gift taxes so deprived Petitioner of her property without due process of law as to be in violation of the 14th Amendment to the United States Constitution.

2. Whether the use of such a tax avoidance device can properly be recognized to avoid federal estate and gift taxes.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The 14th Amendment to the Constitution of the United States, § 1, provides in pertinent part:

> "... nor shall any state deprive any person of life, liberty, or property, without due process of law..."

§ 2036 of the Internal Revenue Code (1954) provides in pertinent part that:

> "The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer . . . by trust or otherwise under which

> he has retained for his life or for any period not ascertainable without reference to his death. . .
>
> 1. The possession or enjoyment of, or the right to the income from, the property.
>
> 2. The right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom."

§ 2037 of the Internal Revenue Code (1954) provides that:

> "The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time after September 7, 1916, made a transfer . . . by trust or otherwise if . . .
>
> 1. The possession or enjoyment of the property can, through ownership of such interest, be obtained only by surviving the decedent."

§§ 2501, 2511, and 2512 of the Internal Revenue Code (1939) provide the imposition of a tax "on the amount of the value of property transferred which exceeds the value of the consideration."

STATEMENT OF THE CASE

Petitioner was the mother of Respondent in the within action. During the course of these proceedings, Petitioner passed away and a personal representative was appointed to carry on the litigation. In 1963, Petitioner owned as a part of her estate 160 acres with a cabin in Jefferson County, Colorado (Record 18, 543-545). In order to eliminate or minimize the estate and gift taxes, Petitioner employed an attorney to devise a system whereby the property would be placed out of her estate at the time of her death. To this end, the attorney

formed a corporation, C.B.H. Cabin, Inc., and conveyed to it the acreage. The attorney then created 50 shares of stock in the corporation and conveyed the same to Petitioner. Subsequently, as part of the scheme devised by her attorney, Petitioner transferred 10 shares of corporate stock each year for 5 years to Respondent. This was done by the attorney to accomplish the objective of avoiding both gift and estate taxes and was so testified to by both the attorney and Petitioner (Record 545, 806-810, 839-840, 901, 1037; Appendix A). The corporation had no function other than to hold the bare legal title to the aforementioned real property, with Petitioner to retain during her lifetime all management rights, use, and all dominion and control over the property (Record 546-553, 563-576, Record Exhibits A-H, Appendix A, p. 2). The arrangement then went on to provide that Petitioner Howell could transfer to Respondent Gates shares of stock over a period of time but that all dominion and control over the property would be retained by Petitioner during her lifetime, with ownership to pass to Respondent for the benefit of all 3 daughters at the time of Petitioner's death (Record 901-902, Record Exhibit B, pp. 10-12).

During the period from 1963 to 1967, during which time the shares of stock in C.B.H. Cabin, Inc. were conveyed, Petitioner continue to pay the real estate taxes (Record 645-647). Following completion of the transfer of all shares in the corporation to Respondent, Petitioner continued to pay the real property taxes until the year 1972 (Record 1267-1270). The corporation never took title to any other property, real or personal (Record 652). Further, the corporation never maintained a bank account nor performed any services or responsibilities for the real property (Record 653).

Additionally, it should be noted that the corporation conducted no business, paid no taxes, held title to no other assets, maintained no employees or bank account, held no meetings of shareholders and carried on no function or activity whatsoever (Record 642-648, 650-654).

Following the transfer of shares in the corporation to Respondent, serious difficulties arose between Petitioner and Respondent with respect to the use of the property, with the result that Respondent caused the shareholders meeting to be held, removed her mother as an officer of C.B.H. Cabin, Inc. and caused the corporation to deed the property to herself (Appendix A, p. 2).

A quiet title action was commenced by Petitioner. The trial court found that in spite of the language contained in the minutes of the organizational meeting of the corporation (Appendix A, p. 2), the transfer of title of the real estate to the corporation and the subsequent transfer of all shares of stock in the corporation from Petitioner to Respondent constituted a completed gift, not in trust, and was not a testamentary disposition. This was set forth in the written Findings of Fact, Conclusions of Law and Judgment of the trial court (Appendix D). A motion for new trial was timely filed and was denied, whereupon appeal was taken to the Colorado Court of Appeals. Following the judgment of the Court of Appeals of the State of Colorado affirming the trial court, a petition for rehearing was filed and was denied on September 7, 1978 (Appendix C). Certiorari in the Colorado Supreme Court was denied on December 12, 1978 (Appendix B).

REASONS FOR GRANTING THE WRIT

I. By Virtue of the Decisions of the Court of Appeals of the State of Colorado, Wherein Certiorari Has Been Denied by the Supreme Court of Colorado, the State Has Decided a Federal Question of Substance in a Way Probably not in Accord With Applicable Decisions of This Court. Additionally, the Failure of the State Court to Properly Consider the Evidence, Together With Its Misapplication of the Law as Set Forth by This Court, Resulted in a Denial of Due Process of Law.

Not only does the decision of the Court of Appeals of the State of Colorado set forth legal principles and contravention of decisions of this Court but also the decision contravenes decisions from federal courts in other circuits.

It is clear in the instant case, that the sole purpose for creation of the corporation, C.B.H. Cabin, Inc., was to simply hold bare legal title to real property but to carry on no other functions whatsoever (Record 1039-1040). Further, the sole purpose for causing the corporation to hold such title, but to leave dominion and control over the property with Petitioner, was simply to avoid gift and estate taxes (Record 545, 806-810, 839-840, 901, 1037).

The organizational minutes of the first meeting of the corporation are set forth in the Record as Exhibit B, at the trial at pp. 10-12, as follows:

> "Thereafter upon motion made, seconded and passed, the corporation accepted the conveyance from Charlotte B. Howell of the following described real property situate in the County of Jefferson, State of Colorado: The SW ½ of Section 4, Township 5 South, Range 70 West of the 6th P.M., together with all easements and rights of way appurtenant thereto; all water and water rights appurtenant thereto.
>
> "In consideration of the conveyance of this property to the corporation, the officers of the corporation were authorized and instructed to issue 50 shares of the capital stock of the corporation to Charlotte B. Howell. Said stock was to be issued fully paid and non-assessable and was to be the only issued and outstanding stock of the corporation. For Federal and State income and revenue stamp purposes, the value of this property is $18,000.00.
>
> "Thereafter a general discussion was held concerning the operations of this corporation. This corporation was set up fully for the purpose of holding title to the real property described in the above paragraph. The property is non income producing and has been for many years a place which Charlotte B. Howell has used as a mountain retreat. At all times during her lifetime, Charlotte B. Howell shall have the exclusive right to use this property for whatever purpose she desires. The corporation, as a separate legal entity, shall have and exercise no control or dominion over the property whatsoever. The sole purpose of the corporation shall be to hold the legal title to the property as a perpetual entity. Regardless of the ownership of the corporation as evidenced by the issuance of its outstanding stock, no stockholder of the corporation, other than Charlotte B. Howell, shall have or exercise any power or dominion over the real property held by the corporation. At the date of Mrs. Howell's death, the legal title to the property shall remain in the corporation's name, but at that time the owners of the corporation as evidenced by the ownership of the outstanding stock shall then be the sole owners of the real property held by the corporation.

"Since the corporation will own only non income producing property, no Federal or State income tax returns will be necessary at any time. Furthermore no active management will be necessary for the operation of the corporation and other than the annual Colorado Corporation Report, necessary to keep current the status of the corporation, no reports or administrative duties of any nature will be necessary by the corporation officers. For that reason, no periodic meetings will be held by the Board of Directors or the officers and the annual meeting will not be held unless necessary. The President of the corporation may call a meeting at any time upon proper notice. The Secretary of the corporation, Frederick J. Pattridge, shall be the agent for the corporation, shall see that the annual Colorado Corporation Report is filed and shall see that the corporation remains in good standing in the State of Colorado. Mr. Pattridge will also be agent for the corporation in regard to any matters that must be handled from a legal standpoint.

"The only continuing obligation of the corporation will be the real property taxes on the property to which the corporation holds legal title. This tax statement will be directed to Mrs. Charlotte B. Howell for her disposition."

Further, these organizational minutes, together with other documents, were forwarded by Petitioner's attorney to her, with a cover letter explaining the transaction that had been accomplished on her behalf (Record 568-570). The letter, which was admitted into evidence as Exhibit E at trial and is contained in the Record, states, in pertinent part, a follows:

"The copy of the Articles of Incorporation and the By-Laws are for your records. They comply in

all respects with requirements of the Colorado law in connection with corporations. For this particular type of corporation, they do not have too much legal significance. You should read carefully, however, the copy of the Minutes of the organizational meeting that I am also sending to you in this letter. These Minutes indicate clearly the purpose of the corporation and the way in which it will be operated. It is my opinion that we will not need to have any meetings whatsoever and that unless you change your mind on the use of the cabin, the corporation can remain dormant. When you decide to give the stock to Mrs. Gates we will also have her sign a document to the corporation recognizing the fact that she has no dominion over the cabin property until and unless you allow her these rights. You are further protected in this matter in the Minutes of the organizational meeting. Incidentally, if you will return the original page of the Minute Book signed by you, I will see that it is signed by Mrs. Gates after you decide to make the gift of the stock. It is not necessary to have her sign these Minutes at this time and I will not do anything along that line until you advise me. Actually, it is not even legally necessary for Mrs. Gates to sign the Minutes, but I would suggest it after you have made the gift of the stock."

During the time the corporation was in existence, it never held title to any other property, real or personal (Record 652); it never maintained a bank account (Record 643); it never maintained or administered the real property in any way (Record 654-656); and no meetings of the Board of Directors or shareholders of the corporation were ever held (Record 643). Thus, the corporation was in fact a sham, which should have been regarded as a legally non-existent entity.

The import of the decisions of the state court is to recognize the existence of the corporate entity and to

further confirm the transfer of the real property from Petitioner to Respondent through the use of the corporate shares.

Decisions of this Court which have been determined in the context of a setting relating to the allocation of income tax have specifically held that in order for a corporation to be recognized, it must have been created for a legitimate business purpose or must carry on a business activity, and such transactions must have an industrial or commercial purpose and not be entered into simply for the motive to escape taxation. A corporation created simply for the purpose of escaping taxation will not be recognized. *Gregory* v. *Helvering,* 293 U.S. 465, 55 Sup. Ct. 266, 79 L.Ed. 596, 97 ALR 1355 (1935); *Higgins* v. *Smith,* 308 U.S. 473, 60 Sup. Ct. 355 (1940); *Dalton* v. *Bowers,* 287 U.S. 404, 53 Sup. Ct. 205 (1932). Where the purpose of the corporation is not the equivalent of business activity, it should not be regarded as a separate entity from the individual creating it. *Moline Properties* v. *Commissioner,* 319 U.S. 436, 63 Sup. Ct. 1132 (1943).

Further, decisions from federal courts in the various circuits have likewise confirmed that a corporation which is nothing more than a passive dummy with no activity other than to take and hold title to real estate should not be tolerated and cannot be recognized. *Haberman Farms, Inc.* v. *U.S.,* 305 F.2d 787 (8th Cir. 1962); *Jackson* v. *Commissioner,* 233 F.2d 289 (2nd Cir. 1956); *United States* v. *Brager Building and Land Corporation,* 124 F.2d 349 (4th Cir. 1941).

Petitioner contends that the uncontroverted evidence in the instant case, relating to the purpose of the corporation and the activities of the corporation, demonstrate

that under the decisions promulgated by this Court, the legal existence of the corporation should not have been recognized by the Colorado court. Thus, any shares of stock issued in the corporation should not have been recognized as a separate entity from Petitioner, with the result that the transfer of shares in stock transferred nothing, and legal title to the real property should have been restored to Petitioner, who already held equitable title thereto. Failure of the Colorado courts to recognize the transparency of this scheme and to rule in accordance with the decisions of this Court, it is submitted, require review and correction by this Court.

It is also noted that the decisions of the Colorado courts confirmed the existence of a valid inter vivos gift and not a testamentary disposition. This was extensively argued in the courts below, and their decision, it it submitted, is in direct conflict with decisions of this Court. Inasmuch as the unrefuted purpose of the transaction herein involved was to create a scheme whereby a gift of a future interest in land might be conveyed in a manner to avoid taxes, with dominion and control over the property to be retained by Petitioner, the Colorado courts' holding that a valid inter vivos gift was created is inconsistent with this Court's determinations in many cases wherein it has been held that "the essence of a gift is the abandonment of control over the property." *Smith* v. *Shaughnessay,* 318 U.S. 176, 63 Sup. Ct. 545 (1943); *Helvering* v. *Clifford,* 309 U.S. 331, 60 Sup. Ct. 554 (1940); *Burnett* v. *Guggenheim,* 288 U.S. 280, 53 Sup. Ct. 369 (1933).

It was argued in the Colorado Court of Appeals that because Petitioner's estate tax attorney's advice was inconsistent with federal law, the transaction should

be set aside for a unilateral mistake. Although as a general rule, rescission or reformation is allowed only in the instance of a mutual mistake, there have been decisions rendered in other circuits which have held that a unilateral mistake with respect to a voluntary conveyance (i.e. without consideration) is subject to reformation or rescission as against the grantee. *Dodge* v. *United States,* 413 F.2d 1239 (5th Cir. 1969).

It is evident that the decisions of the Colorado Court either confirm the intent of Petitioner and her attorney in creating the scheme and conflict with the federal statutes relating to gift and estate taxes and the decisions of this Court relating thereto, or is contrary to decisions in other circuits which render rescission as a remedy in situations involving the conveyance of real property in the context of tax avoidance, where a unilateral mistake occurs in the ability to accomplish that which is desired to be achieved by virtue of the transfer.

On the basis of the foregoing argument and authority, Petitioner submits that the decisions of the Colorado courts are contrary to the applicable decisions of this Court and either recognize the viability of such schemes for tax avoidance purposes, or so violently failed to consider even the unrefuted evidence relating to the intent of Petitioner in creating the transfer, that to allow such decisions to stand results in the state condoning and participating in depriving Petitioner of her real property without due process of law.

II. The Judgment and Opinions of the Colorado Courts Are so Totally Devoid of Evidentiary Support as to Be Invalid Under the Due Process Clause of the 14th Amendment.

In addition to the organizational minutes, correspondence, exhibits, and testimony previously referred to herein, further evidence of Petitioner's intent to

retain control over the property and create a testamentary gift without complying with the Law of Wills in Colorado is evidenced by unrefuted testimony in the Record.

Petitioner's unrefuted testimony included the following:

> "My intention was that since she (Gates) lived in Denver, she could look after the situation better than the other two girls, who didn't live in Denver, and it was only that she would have better access to it because she was one of the three girls that I wanted to benefit and that was the only reason that I gave it to her, was to have her exercise her prerogative of looking after it." (Record 901-902).

Further, Petitioner testified that "I wanted her to have no rights until my death. I wanted none of the girls to have them, but I wanted her, because she lived in Denver, to sort of look after the situation." (Record 902). Later in the testimony, Mrs. Howell noted that she became concerned about Mrs. Gates' action toward the property and sought the assistance of her attorney in 1970 to clarify the parties' rights in the property (Record 913-920, 925-926). A good deal of correspondence then ensued, with the result that Respondent acknowledged on September 23, 1970, after all shares of stock in the corporation had been transferred to her, in a letter to Plaintiff (Record Exhibit YY) stating, "My lawyer just forwarded Mr. Pattridge's letter, and I am delighted to know where I stand on the cabin. . ." The correspondence from Petitioner to which Respondent was responding, had clearly indicated Petitioner's retention of dominion and control and rights in and to the real property.

Additionally, Mr. Pattridge, the attorney who set up the corporation and attempted to devise the tax-avoidance device, testified that the purpose was to be able to ultimately dispose of the property without being subject to the heavy burden of taxes (Record 580). On this state of the Record, the trial court and the Court of Appeals concluded that the transfer by Petitioner of shares of stock in the corporation to Respondent constituted a gift by Petitioner of the property, legal title to which was held in the name of the corporation. In so doing, the courts completely overlooked the clear exposition of the organizational minutes which were drafted in contemplation of the transfer of property, likewise, it is significant that the Court of Appeals laid great stress upon the fact that the *daughter* (Respondent, transferee) did not see all of the minutes and therefore declined to find that her intent was consistent with that of Petitioner (Appendix A). It is submitted that the Colorado Court of Appeals erroneously concerned itself with the intent and information given to the *daughter*, while it it the intention of the mother (Petitioner, grantor) that is controlling. This was specifically pointed out to the Colorado Court of Appeals in the petition for rehearing.

On occasion, this Court has been called upon to grant certiorari in those instances where it was felt necessary to correct plain error and where the decision below seems to be so shockingly wrong as to require this Court's consideration to avoid a denial of due process. *Thompson* v. *City of Louisville,* 362 U.S. 199, 80 Sup. Ct. 624 (1960); *Williams* v. *Lee,* 358 U.S. 217, 79 Sup. Ct. 269 (1959); see also *Vachon* v. *New Hampshire,* 414 U.S. 478, 94 Sup. Ct. 664 (1974); *Douglas* v. *Buder,* 412 U.S. 430, 98 Sup. Ct. 2199 (1973).

It is submitted that a review of the Record demonstrates that the Findings of Fact, Conclusions of Law and Judgment of the trial court and as affirmed by the Colorado Court of Appeals, was so totally devoid of evidentiary support as to be invalid under the due process clause of the 14th Amendment, as recited in *Douglas* v. *Buder, supra.*

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be granted.

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Attorneys for Petitioner

APRIL 9, 1979

APPENDIX

"APPENDIX A"

COLORADO COURT OF APPEALS

No. 76-829

Not Selected for Publication. Not to Be Cited as Precedent in any Colorado Court.

CHARLOTTE B. HOWELL, Plaintiff-Appellant,

v.

MITTEN H. GATES and C.B.H. CABIN, INC.,
Defendants-Appellees.

Appeal from the District Court of Jefferson County

Honorable Joseph P. Lewis, Judge

JUDGMENT AFFIRMED

DIVISION II
Opinion by JUDGE STERNBERG
Enoch and Kelly, JJ., concur

Opinion filed and judgment entered on the 10th day of August, 1978.

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In order to minimize estate taxes, plaintiff Charlotte B. Howell formed a corporation, C.B.H. Cabin, Inc., conveyed to it 150 acres of partially improved real estate, and took back the 50 shares of stock of the corporation. Subsequently, beginning in 1963, she transferred 10 shares of corporate stock each year for five years to the defendant, her daughter, Mitten H. Gates. In 1972, following several years of disputes over use of a cabin located on the property, the mother requested the daughter to reconvey the stock. Instead, the daughter caused a shareholders meeting to be held, removed her mother as an officer of C.B.H., and caused the corporation to deed the property to herself. The mother brought this quiet title action, but the daughter prevailed and title was quieted in her. We affirm.

The mother's first contention on appeal is that by her original conveyance of the property to the corporation she created an express, passive trust with herself as beneficiary. In this regard she points to language contained in the minutes of the organizational meeting of the corporation which provided that:

> "At all times during her lifetime, Charlotte B. Howell shall have the exclusive right to use this property for whatever purpose she desires. The corporation, as a separate legal entity, shall have an exercise no control or dominion over the property whatsoever. The sole purpose of the corporation shall be to hold the legal title to the property as a perpetual entity. Regardless of the ownership of the corporation as evidenced by the issuance of its outstanding stock, no stockholder of the corporation, other than Charlotte B. Howell, shall have or exercise any power or dominion over the real property held by the corporation."

However, the record reveals that the attorney who drafted these minutes was the only one present at the "meeting," that he sent a copy of them with other perti-

nent documents to the mother who then resided in Switzerland. While the daughter signed the last page of the minutes, the record reveals that she did not see the pages in which the quoted language appears because they had not been sent to her. Because the conclusion of the trial court that no express trust was created by these minutes rests on competent evidence in the record, it must be affirmed on review. *See Morgan* v. *Wright,* 156 Colo. 411, 399 P.2d 788 (1965); *In Re Estate of Granberry,* 30 Colo. App. 590, 498 P.2d 960 (1972).

The court properly declined to consider that the statement contained in the organizational minutes limited the deed which conveyed title to the corporation. The deed did not refer to the minutes or contain other language limiting the effect of the transfer. Nor did the minutes amount to a contemporaneous collateral agreement which could defeat the doctrine of merger. *See Westminster* v. *Skyline Vista Development Co.,* 163 Colo. 394, 431 P.2d 26 (1967); *Glisan* v. *Smolenske,* 153 Colo. 274, 387 P.2d 260 (1963). Plaintiff's efforts to invoke esoteric doctrines of trust law must fail in the face of the court's conclusion, based upon correspondence in evidence, and testimony that a transfer in trust was not intended. *See Fleming* v. *Singer,* 168 Colo. 195, 450 P.2d 635 (1969); *Denver Chapter No. 145* v. *Mile Hi City Chapter No. 360,* 171 Colo. 541, 469 P.2d 740 (1970). We agree with the trial court's conclusion that with the transfer to the defendant of the last 10 shares of corporate stock, an unrestricted and irrevocable inter vivos gift from the mother to the daughter had been completed.

Transfers of property between parent and child are presumed to be gifts unless the contrary be clearly and unequivocally shown. *First National Bank* v. *Honstein,* 144 Colo. 176, 355 P.2d 535 (1960); *Morgan* v. *Wright, supra.* There was no limiting language when the five transfers of corporate stock were made, and there is no basis to dispute

the finding of the trial court that the gift was irrevocable. *See Bunnell* v. *Iverson*, 147 Colo. 552, 364 P.2d 385 (1961).

The mother asserts that a contrary result is required here by the holding in *Curtiss* v. *Ferris*, 168 Colo. 489, 452 P.2d 38 (1969). We do not agree. There, the evidence was "undisputed" that a deed from a grandmother to a granddaughter creating a joint tenancy in them was to be operative on the death of either. Here, there was a factual dispute. The record contains a letter from the mother to the daughter speaking of this transaction as a final gift, and testimony that the mother told the daughter to take responsibility for maintenance of the property and payment of taxes thereon. Thus *Curtiss* is distinguishable.

Judgment affirmed.

JUDGE ENOCH and JUDGE KELLY concur.

"APPENDIX B"

IN THE SUPREME COURT OF THE STATE OF COLORADO

No. C-1750—September Term, 1978

Certiorari to the Court of Appeals

No. 76-829

CHARLOTTE B. HOWELL, Petitioner

v.

MITTEN H. GATES AND C.B.H. CABIN, INC., Respondents.

ON PETITION FOR WRIT OF CERTIORARI to the Court of Appeals.

After review of the record, the briefs and the opinion of the Court of Appeals,

IT IS ORDERED by this court that said petition be, and the same hereby is, denied.

MR. JUSTICE ERICKSON and MR. JUSTICE CARRIGAN DO NOT PARTICIPATE.

By the Supreme Court
Sitting En Banc

DECEMBER 11, 1978

Certified to be a full, true and correct copy. Supreme Court, State of Colorado, David W. Brezina, Clerk of the Supreme Court, by /s/ Joan M. Rhyne, Deputy Clerk

xc:

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"APPENDIX C"

IN THE COURT OF APPEALS OF THE STATE OF COLORADO

No. 76-829

Order

CHARLOTTE B. HOWELL, Plaintiff-Appellant,

vs.

MITTEN H. GATES and C.B.H. CABIN, INC.,
Defendants-Appellees.

Upon consideration of the Petition for Rehearing filed by the Appellant herein, said Petition is hereby DENIED. Unless otherwise ordered MANDATE will issue 9-14-78.

BY THE COURT, JUDGES ENOCH, KELLY AND STERNBERG.

Dated: 9-7-78

[SEAL] Court of Appeals, Colorado

Copies mailed to: Counsel of Record on: 9-7-78, by: C. S.
Colorado Court of Appeals

If certiorari to the Supreme Court is planned and a stay of issuance of mandate desired, petition for such stay must be filed in the Court of Appeals prior to the above date of issue.

"APPENDIX D"

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF JEFFERSON
STATE OF COLORADO

Civil Action No. 44814, Division 7

Filed Sept. 23, 1976

Findings of Fact, Conclusions of Law, and Order

CHARLOTTE B. HOWELL, Plaintiff,

vs.

MITTEN H. GATES and C.B.H. CABIN, INC., Defendants.

APPEARANCES

Plaintiff appeared by Bennett Rolfe, Attorney at Law, 407 Wilshire Boulevard, Santa Monica, California; Defendant appeared by Gorsuch, Kirgis, Cambell, Walker and Grover, Joseph M. Montano and Robert Wilson, Attorneys at Law, 1200 American National Bank Building, Denver, Colorado.

Trial on the merits was held on June 10, 1976, and the Court granted leave to respective counsel to file written arguments in lieu of oral arguments to the Court. All briefs now having been filed, the Court renders its Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

Prior to February 18, 1963, the Plaintiff was the owner in fee simple of the real property described in the complaint and which was located in the County of Jefferson, State of Colorado.

At the request of the Plaintiff, Mr. Frederick J. Pattridge, Attorney at Law, formed a corporation, C.B.H. Cabin, Inc., a Colorado corporation, and a Certificate of

Incorporation was issued by the Secretary of State for Colorado on February 18, 1963. The directors were Charlotte B. Howell, Mrs. Harry F. Gates and Frederick J. Pattridge; the officers were Charlotte B. Howell, President and Treasurer; Frederick J. Pattridge, Secretary.

On February 18, 1963, the Plaintiff conveyed the subject property to the corporation and, for Federal and State income and revenue stamp purposes, the value of the property was stated to be $18,000.00. In consideration for the conveyance to the corporation, Plaintiff was issued fifty shares of the corporate stock of C.B.H. Cabin, Inc.

The Plaintiff made a gift of ten shares of the corporation stock to the Defendant each year beginning in December, 1963 and on each December thereafter through December, 1967, at which time a total of fifty shares of the stock was held by the Defendant.

Plaintiff sent to the Defendant a letter stating that the December, 1967 transfer was a final gift, and that she hoped that the Defendant would cherish the cabin property and share it with the Defendant's sisters if they ever cared to go up there. (Plaintiff's Exhibit CC).

Neither the stock certificates nor the need conveying the property to the corporation contain language which limits or otherwise controls the transfer or conveyance of the property.

The expenses of the corporation were paid by the Plaintiff while she was an officer and director of C.B.H. Cabin, Inc. until 1972, when the Defendant began paying the property taxes.

In May, 1972, a meeting of the trustees of the Barth Foundation was held in Mexico, at which the Defendant and Dean Norris, attorney for the Foundation, were present. While visiting with her, Gates was informed by her mother that she would have to pay the expenses of the cabin property from that time on. This conversation was

confirmed by Dean Norris, the attorney for the Barth Foundation.

Gates was removed as a trustee of the Barth Foundation in July, 1972, and in May, 1972 Frederick Pattridge resigned as officer, director and attorney for C.B.H. Cabin, Inc. and from all duties with the Barth Foundation.

The records of the Barth Foundation and C.B.H. Cabin, Inc. were turned over to Dean Norris by Frederick Pattridge, and these records were subsequently given by Norris to Rosemary Howell, daughter of the Plaintiff.

Plaintiff, through her California attorney, sent a letter to the Defendant requesting her to reconvey her stock in C.B.H. Cabin, Inc. to the Plaintiff. Prior to the sending of this letter, the Plaintiff had told her attorney that Gates was a trustee of the property and that all of the Howell family were the beneficiaries. (Plaintiff's Exhibit NNN).

In September, 1972, Gates held a shareholders meeting pursuant to a notice prepared by Dean Norris and mailed to the Plaintiff. Gates, as the sole shareholder, appointed a new slate of directors at that meeting. Later, a directors' meeting was held and new officers were appointed. (Plaintiff's Exhibits UUU and TTT).

The cabin property was conveyed to Gates as nominee in 1972 (Plaintiff's Exhibit BBBB) and in June, 1973, Gates reconveyed it back to the corporation. Gates then caused the corporation to be liquidated and the property was distributed to her in liquidation of her 100% ownership of the outstanding stock. (Plaintiff's Exhibit CCC, DDD, and IIII).

Subsequently, the Plaintiff filed this action against Gates and C.B.H. Cabin, Inc. on August 7, 1975.

Conclusion of Law

The central issue in the case before this Court is the effect of the method chosen by Plaintiff to transfer the

cabin property which is the subject matter of this suit. From the correspondence, testimony and depositions presented in this case, there is no doubt that Plaintiff did intend to make a gift of the Indian Hills property to the Defendant. The extent of that gift and the time when it was to take effect is, however, subject to dispute, particularly in light of the unusual means by which that gift was conveyed—transfer of the shares of C.B.H. Cabin, Inc. to the Defendant.

Plaintiff strongly argues that the corporate minutes of the organization meeting of C.B.H. Cabin, Inc. (Plaintiff's Exhibit B) reflect the intent of the parties as to the control the Plaintiff was to maintain over the property in question. From those minutes it can be seen that there was a "discussion" about Plaintiff's continuing dominion over the cabin property she was about to transfer to the newly-formed corporation. During that meeting the board of directors moved, seconded and passed a resolution issuing fifty shares of stock to the Plaintiff in return for her conveyance of the cabin property to the corporation. A Deed (Plaintiff's Exhibit C) was transferred from Plaintiff to the corporation soon after this meeting.

Plaintiff contends that this discussion in the corporate minutes of the organizational meeting of C.B.H. Cabin, Inc. should be read together with the deed conveying title to the property. It is argued that if these documents are read together it becomes clear that the parties intended an express passive trust to be formed by the conveyance with the corporation as trustee and Plaintiff as beneficiary. It is further argued that if such was the intent of the parties, the Statute of Uses immediately reverted title of the subject property to the settlor-plaintiff.

In support of this position, Plaintiff cites *Westminster* v. *Skyline Vista*, 163 Colo. 394, 431 P.2d 26 (1967), as saying that the corporate minutes and the deed must be read together. The parties in the suit at Bar contend that *West-*

minster is important to their respective positions, and the Court will consider that decision in some detail.

The facts of *Westminster,* basically, are as follows: Two people, the LaContes, owned a quarter section of land upon which was situated a water well pump, reservoir and appurtenant equipment. The well site and equipment were conveyed to Skyline's predecessors in title. The deed provided express provisions reserving the right of the LaContes to receive water from the deeded property with a ceiling on the prices which could be charged on that water.

A little less than two years later, Skyline entered into an annexation agreement with the City of Westminster. Included within that agreement was a covenant by Westminster to purchase the well site previously described, and by Skyline to execute a sufficient warranty deed conveying that property. The annexation agreement also contained a paragraph describing the reservation of water rights to the LaContes and a provision for Westminster in the future to pay the difference between the water tap charges set by the original owners and the actual cost of the water. The warranty deed was executed the same date as the agreement. When the LaContes were subsquently charged a higher tap fee they brought suit against Westminster, who brought in Skyline as a third-party defendant.

Skyline argued successfully at trial that the water rights agreement "merged" with the deed and that failure to incorporate in the deed provisions of the paragraph on tap fees contained in the annexation agreement nullifies that provision. The Colorado Supreme Court in its decision disagreed, quoting *Glesan* v. *Smolenske,* 153 Colo. 274, 387 P.2d 260 (1963):

> "If the terms of a sale and purchase agreement are fulfilled by the delivery of a deed there is a merger, but if the delivery of the deed is only one of a number of things to be performed under the terms of that contract, the delivery of the deed constitutes part performance, and the other matters to be performed remain obligatory." 153 Colo. at 280.

The Court decided that in *Westminster* the contemporaneous execution of the annexation agreement and the deed fell under the rule quoted in *Glesan, supra,* and that, as a result, the two must be construed together. The Court further stated that the intent of the parties from the entire agreement was that annexation agreement was to "govern their actions subsequent to the delivery of the deed." 163 Colo. at 399.

This Court is of the opinion that if *Westminster* applies at all, the "discussion" in the corporate minutes does not constitute an agreement which parallels the one entered in *Westminster.* In the first place, the legal effect of "a general discussion concerning the operations of this corporation" is in doubt. Testimony adduced at trial raises a question as to whether the Defendant even knew the contents of the minutes that she, as director, signed. In the opinion of this Court, the signature of the minutes by the Defendant constitutes no more than an acknowledgement that the proceedings were held and are reflected in those minutes. *Hornady* v. *Goodman,* 146 S.E. 173, 167 Ga. 555 (1928). Second, though corporate action need not be reflected in corporate minutes in order to be valid, 19 C.J.S. *Corporations* § 751, there is no indication here of corporate action. Section 7 of the Bylaws of C.B.H. Cabin, Inc. states that "the act of the majority of the directors present at a meeting at which a quorum is present shall be the act of the Board of Directors." (Plaintiff's Exhibit B). Such action was taken at the organization meeting, but not on the manner of holding the cabin property.

Thus, since the "discussion" was not an agreement between the corporation and the Plaintiff which would "govern their actions subsequent to the delivery of the deed,"

Westminster, supra, it cannot be construed with the deed to the corporation as per the *Westminster* decision.

This Court is of the opinion, however, that even though the minutes and the deed cannot be read together under the rule in *Westminster,* it might be possible to find a trust under these circumstances if there was competent evidence to show. *Waterbury* v. *Fisher,* 5 Colo. App. 362, 38 P.846 (1894). Under Colorado law, to establish an express trust "the essentials of a trust must appear clearly." As stated in *Morgan* v. *Wright,* 156 Colo. 411 (1965) at 415, "Clear, explicit, definite, unequivocal and unambiguous language or conduct is required."

In the evidence presented before this Court there has been no such language or conduct which would indicate that a trust was intended. The minutes do reflect that the discussion at the organizational meeting involved the Plaintiff's control and dominion of the property, but no language which would definitely indicate a transfer in trust was intended. (Plaintiff's Exhibit B) Evidence additionally showed that the formation of a trust was rejected by Plaintiff in the original discussions she had with her attorney concerning the disposition of the priperty. The deed does not show the corporation received the property as trustee (Plaintiff's Exhibit C). Additionally, even though the Plaintiff was represented by counsel in the incorporation and conveyance of the property, no "words of art" were used to reflect a formation of a trust. *Fleming* v. *Singer,* 168 Colo. 195 (1969), *Denver Chapter No. 145, Order of Ahepa* v. *Mile Hi City Chapter No. 360,* 469 P.2d 740 (1970). None of the correspondence during the transfer of shares of C.B.H. Cabin, Inc. ot the Defendant indicate the property was held in trust by the corporation. It is to be noted that in a letter from Pattridge to the Plaintiff, written in 1970, Pattridge said, "I am thinking of setting up the property in a trust with an independent trustee to hold and manage the property." (Exhibit W)

From the evidence, then, the Court finds that there was no agreement between C.B.H. Cabin, Inc. and Plaintiff to have the conveyance to the corporation to be for the benefit of the Plaintiff, nor any other evidence indicating the intent to form an express trust.

The Court does find that the Plaintiff intended her "control and dominicn" of the property to come through control of C.B.H. Cabin, Inc. As a director and sole shareholder of C.B.H. Cabin, Inc. Plaintiff did have such control through *the working of that corporation.* The corporate minutes and the language in the correspondence demonstrate this. As an example, in a letter dated September 3, 1970 from Plaintiff's attorney, Pattridge, (Plaintiff's Exhibit RR), to the Plaintiff, Pattridge states:

> "First of all, you should remember that the title to the property is in the name of the corporation and the Directors of the corporation are you, Mitten and myself. The officers of the corporation are you, as President and Treasurer, and myself, as Vice-President and Secretary. Therefore, being a majority of the Board of Directors of the corporation, you and I have complete control over how the property of the corporation is used."

Any other "understanding" or supposition by the Plaintiff cannot be given effect and certainly cannot be grounds for recision of the conveyance to the corporation.

Once the corporation was formed and title to the cabin property transferred to it, the gift of the shares of C.B.H. Cabin, Inc. became a matter of a gift of stock, not of cabin property. That transfer of shares was completed by five gifts from Plaintiff to Defendant from 1963 to 1967. Some of the correspondence from Pattridge to the Plaintiff reflects the nature of the stock transfer to the Defendants. In Plaintiff's Exhibit I, Pattridge states that when all of the shares of C.B.H. Cabin, Inc. are given to the Defendant,

"she will be the sole owner of the corporation, which, in turn, is the sole owner of the cabin property." Plaintiff's Exhibit AA, again a letter from Pattridge to Howell, states that the transfer of the last ten shares of stock in 1967 "will complete the transfer of the entire property . . ." The letter of December 1, 1967 from Mrs. Howell to the Defendant (Plaintiff's Exhibit CC) further solidifies the impression the gift of stock was absolute. There has been no showing that there was any reservation or limitation placed on those gifts of stock. In addition, the stock was transferred on the corporate books. *Thomas* v. *Thomas,* 70 Colo. 29, 197 P. 243 (1921), *Hageman* v. *First National Bank,* 32 Colo. App. 406, 514 P.2d 328 (1973). Thus, from all of the evidence, it is apparent to this Court that the transfers of stock from Howell to Gates was complete, unrestricted and irrevocable. *Cass* v. *Blake,* 98 Colo. 381, 56 P.2d 42 (1936), *Hardy* v. *Carrington,* 87 Colo. 461, 288 P. 620 (1930). As a result, the Plaintiff no longer has a right to rescind the gift of these shares.

Once the Defendant gained control of C.B.H. Cabin, Inc., as majority stockholder, she was able to install a new slate of directors for that corporation and operate that corporation within the bounds of the law. Legal control and dominion of the cabin property still rested with the corporation at this point, but the corporation was controlled by the Defendant, not the Plaintiff. There has been no evidence showing that the Defendant's actions subsequent to her assumption of control of C.B.H. Cabin, Inc. were in any way invalid or improper.

From the evidence and the law the Court finds that complete control of the property in question has vested in the Defendant through her receipt of the stock and subsequent control and liquidation of C.B.H. Cabin, Inc. The Court thus finds that the Defendant, under her fifth counterclaim is entitled to a declaration of her rights in that property. The Court further finds, however, that the first, second,

third, fourth and sixth counterclaims by the Defendant are without merit. The Plaintiff has failed to establish her claims before this Court by a preponderance of the evidence.

It is therefore ORDERED, ADJUDGED AND DECREED that:

1. Plaintiff's Complaint be dismissed;

2. The first counterclaim by the Defendant be dismissed;

3. Pursuant to the second counterclaim, injunctive relief enter in favor of the Defendant against the Plaintiff prohibiting Plaintiff from denying the Defendant access to the subject real property;

4. All other claims under the Defendant's second counterclaim be dismissed;

5. The Defendant's third and fourth counterclaims be dismissed;

6. Judgment on the Defendant's fifth counterclaim enter in favor of the Defendant and against the Plaintiff. Title to said property be vested in and the same is quieted in the Defendant;

7. Under the Defendant's sixth counterclaim, the lis pendens filed on said property be released and that further relief on the Defendant's sixth counterclaim be denied. Costs, but not attorney's fees, are hereby awarded to the Defendant.

Dated at Golden, Colorado this 23rd day of September, 1976.

BY THE COURT:
/s/ JOSEPH P. LEWIS
Judge